

1 Business. I have no idea who its officers are, who its
2 directors, whether it's the same company, a different
3 company, and I have no idea where you expect to prove that.
4 Do you expect to prove that here --

5 MR. SILVERMAN: No, your Honor.

6 THE COURT: -- or do you think it's irrelevant?

7 MR. SILVERMAN: I think it's primarily irrelevant
8 to this current proceeding. What I'm trying to demonstrate
9 is that ITV Direct is using accounts other than those
10 accounts that have been identified by Mr. Callahan. When it
11 has a bill that it needs paid, it taps those accounts. It
12 simply hasn't chosen to tap those accounts in order to
13 satisfy the judgment that Cappseals has against it.

14 I'd be happy to move on to the next topic, your
15 Honor.

16 THE COURT: I'm going to let you put in the
17 evidence. I just don't know that you're entitled to the
18 finding or order that you want in this case.

19 MR. SILVERMAN: Well, I can very quickly move on
20 to the next --

21 THE COURT: Okay.

22 MR. SILVERMAN: I'm willing to stipulate that
23 Direct Marketing Concepts or, excuse me, a payment of the
24 first invoice on Purchase Order 1101 came from an account
25 other than ITV Direct's.

1 MR. BROOKS: No, I'm not prepared to stipulate to
2 that because I just don't know the answer to it, if it is
3 the case, but it gets back to it's not the issue before us
4 today.

5 The issue is not whether Direct Marketing Concepts
6 pays some of the bills of ITV. I'll assume for purposes of
7 our hearing today that's true. Let's assume that that's
8 true. I don't think you have the authority today to direct
9 Direct Marketing Concepts, another corporation, to pay the
10 debt of ITV.

11 You have to make a determination to pierce the
12 corporate veil that it is an alter ego, and that's exactly
13 the claim that was presented in the lawsuit that's pending
14 before Judge Tauro for which summary judgment was denied and
15 for which we're going to trial. I have our summary judgment
16 opposition. I mean, I've got all the briefing in here on
17 the alter ego theory, piercing the corporate veil.

18 The fact that Direct Marketing may have paid some
19 bills of ITV doesn't mean you pierce the corporate veil and
20 Direct Marketing becomes liable for it, but if that's --

21 THE COURT: He has a slightly different, I mean,
22 he could put in evidence here that there was income to ITV
23 and that the income was gathered in the name of Direct
24 Business, Direct Business Concepts.

25 You know, ITV sells something to the extent -- I

1 haven't read the complaint, Judge O'Toole's complaint, but
2 let's say ITV enters into an agreement with someone that
3 says, I'm selling you C-Greens, please, make all checks
4 payable to Direct Business.

5 MR. SILVERMAN: Okay.

6 THE COURT: Or they sign the check over to Direct
7 Business. That would be a legitimate area --

8 MR. BROOKS: Or there were checks payable to ITV
9 that were deposited --

10 THE COURT: Deposited into --

11 MR. BROOKS: -- in some other company's account.

12 THE COURT: Right.

13 MR. BROOKS: I mean, that's fair inquiry. I know
14 what the answer to that is, so go ahead, if you want to ask
15 those questions.

16 MR. SILVERMAN: I think I'll move on to the next
17 --

18 THE COURT: Okay.

19 BY MR. SILVERMAN:

20 Q Mr. Callahan, you stated earlier that the only
21 intangible asset (unintelligible) to a property that's owned
22 by ITV Direct is the trademark of ITV Direct; correct?

23 A Earlier today?

24 Q Earlier today.

25 A I did not state that.

1 THE COURT: I thought he said he didn't know if
2 ITV Direct owned any trademarks.

3 MR. SILVERMAN: I'm sorry.

4 BY MR. SILVERMAN:

5 Q What you stated earlier, I believe, is that the
6 only business that uses the trade name ITV Direct or
7 trademark ITV Direct is the company ITV Direct,
8 Incorporated; correct?

9 A I don't recall saying that, no, but if you ask the
10 question again, I'll answer it. I won't be able to speak on
11 the marketing, you know, plan or something like that, but I
12 can tell you in the financial books and records what
13 (unintelligible) I have seen, you know.

14 MR. SILVERMAN: Your Honor, I know there's a few
15 different ways. We've done a review of the U.S. Patent and
16 Trademark Office of Registration, and there are several
17 trademarks that are registered to ITV Direct.

18 Mr. Brooks, would you be willing to stipulate as
19 to those various trademarks?

20 MR. BROOKS: I don't know what's true, so I can't
21 stipulate to it, but I might be able to stipulate to a
22 document.

23 THE COURT: Are you planning on marking these as
24 exhibits? Because you haven't been.

25 MR. SILVERMAN: I am, your Honor, at the end,

1 going to ask that they be admitted in unless you'd like me
2 to do it individually.

3 THE COURT: Well, we're going to have to, for the
4 record, have it clear which documents are which, so.

5 (Pause.)

6 THE COURT: Do you have the bank statements up
7 there? I think the bank statements are an exhibit, too.

8 MR. SILVERMAN: They should be in order.

9 (Pause.)

10 THE COURT: Just give it to me, and then we can go
11 over it, just so I have it.

12 (Pause.)

13 THE COURT: Are you ready, Mr. Brooks? Do you
14 have any comment?

15 MR. BROOKS: Well, it appears to have an
16 affidavit, your Honor, with some attachments. I haven't
17 seen any of this before, but just to speed this along, I
18 have no objection to you taking this evidence by affidavit.

19 THE COURT: Okay. Thank you.

20 (Pause.)

21 MR. SILVERMAN: Would you mark this --

22 THE COURT: Do you want to mark the exhibits now
23 or --

24 MR. SILVERMAN: Sure. Why don't we go ahead and
25 mark the exhibits right now.

1 THE COURT: All right. I have Exhibit 1, which
2 was the ITV Direct Profit and Loss, January 1 through
3 July 26, 2006. I think we -- what I have next is Exhibit 2,
4 which is the ITV Direct bank statements --

5 MR. BROOKS: Right.

6 THE COURT: -- from January 1, 2006, through
7 July 31, 2006.

8 (The document referred to was
9 marked for identification as
10 Exhibit No. 2.)

11 THE COURT: Mr. Brooks, is it fair to say there's
12 no objection to any of the documents shown --

13 MR. BROOKS: I have no objection.

14 MR. SILVERMAN: And the third exhibit is the ERA
15 Lawsuit, your Honor.

16 THE COURT: Actually, it's the ITV Direct Balance
17 Sheet. You don't think?

18 MR. BROOKS: Yes.

19 MR. SILVERMAN: (Unintelligible)

20 THE COURT: Yeah.

21 MR. SILVERMAN: I apologize. I think we
22 juxtaposed it.

23 THE COURT: You did or I did?

24 MR. SILVERMAN: I think we did, I believe.

25 (The document referred to was

1 marked for identification as
2 Exhibit No. 3.)

3 THE COURT: The next one is the, Exhibit 3 is the
4 ITV Direct Balance Sheet as of July 27, 2006. Exhibit 4 is
5 the docket sheet and complaints for ITV Direct versus
6 Electronic Retailing Association.

7 (The document referred to was
8 marked for identification as
9 Exhibit No. 4.)

10 THE COURT: Exhibit 5 is the docket for the First
11 Circuit Court of Appeals in ITV Direct versus Healthy
12 Solutions.

13 (The document referred to was
14 marked for identification as
15 Exhibit No. 5.)

16 THE COURT: Exhibit 6 will be the Joint
17 Stipulation of Fact.

18 (The document referred to was
19 marked for identification as
20 Exhibit No. 6.)

21 THE COURT: Exhibit 7 is the Direct Marketing
22 Concepts Find Report.

23 (The document referred to was
24 marked for identification as
25 Exhibit No. 7.)

1 THE COURT: Exhibit 8 is an invoice dated
2 December 19, 2003, to Direct Marketing Concepts/ITV Direct.

3 (The document referred to was
4 marked for identification as
5 Exhibit No. 8.)

6 THE COURT: And then Exhibit 9 will be the
7 Affidavit of Scott Christy and attachment, attached
8 documents from the patent office; is that right?

9 MR. SILVERMAN: That's correct, your Honor.

10 (The document referred to was
11 marked for identification as
12 Exhibit No. 9.)

13 THE COURT: Okay.

14 MR. SILVERMAN: And, your Honor, I'll move that
15 it's stipulated that (unintelligible) ITV Direct,
16 Incorporated, only be marked.

17 THE COURT: Well, you stipulated that the
18 documents say whatever they say.

19 MR. BROOKS: I stipulated to the admissibility of
20 an affidavit and to the attachments.

21 THE COURT: Okay. And you're pointing to my
22 attention that these are patents in the name of ITV Direct?

23 MR. SILVERMAN: Trademarks, your Honor.

24 THE COURT: I'm sorry. Trademarks.

25 MR. SILVERMAN: Yes.

1 THE COURT: Okay.

2 MR. SILVERMAN: Specifically, at Exhibit C
3 (unintelligible) indicating from U.S. Patent & Trademark
4 office that the mark ITV Direct is owned by, and the
5 registrant is ITV Direct, and it was registered on
6 January 4, 2005.

7 THE COURT: Okay.

8 BY MR. SILVERMAN:

9 Q Mr. Callahan, who at ITV Direct monitors the use
10 or misuse of ITV's intellectual property?

11 A Arthur and William.

12 Q Do you know if they diligently protect those
13 trademarks and trade names?

14 A Do I know if they do?

15 Q Yes.

16 A I would presume that they do, yes, diligently.

17 Q And, Mr. Callahan, is it fair to say that you're
18 aware of the fact that the mark ITV appears on the ITV
19 Direct World Headquarters at the Cummings Center facility,
20 in Beverly?

21 A Yes. The initials ITV, yeah, on the outside of
22 the building, yes.

23 Q And you're also aware that the mark ITV Direct
24 appears throughout the Web site www.itvdirect.com?

25 A When you refer to "mark," are you referring to

1 something that's in that document or --

2 Q I'm referring to the letters ITV?

3 A The letters ITV Direct appear on the outside of
4 the marquis of the building.

5 Q And they also appear throughout the Web site
6 www.itvdirect.com; right?

7 A I haven't, you know, yeah.

8 MR. SILVERMAN: Your Honor, what we had planned to
9 do, but in the interest of speeding things up, we actually
10 had some electronic media to show the Web site, but in the
11 interest of trying to (unintelligible) this a little bit, I
12 believe this would be Exhibit 10.

13 THE COURT: Just what is it as a representation;
14 this is pages from the --

15 MR. SILVERMAN: This is a representation of the
16 home page of www.itvdirect.com.

17 THE COURT: As of what date?

18 MR. SILVERMAN: These were printed, your Honor, as
19 of the end of last week.

20 THE COURT: Okay.

21 (The document referred to was
22 marked for identification as
23 Exhibit No. 10.)

24 BY MR. SILVERMAN:

25 Q Mr. Callahan, have you taken a moment to review

1 Exhibit 10 that's been put before you?

2 A Yes.

3 Q And does this appear to be a fair and accurate
4 representation of ITV Direct's Web site?

5 A It does appear to be a Web site labeled ITV
6 Direct. If it is not reported on the books at ITV Direct,
7 Incorporated, as an asset --

8 Q Well, Mr. Callahan, if you take a look at the
9 second page at what appears at the bottom of the home page,
10 say, it's copyright 2006, ITV Direct, Inc.?

11 A I see that.

12 Q You see that?

13 A Yes.

14 Q And is it fair to say that, at least on this home
15 page, there's advertisement for the product Flex Protex?

16 A I see Flex Protex listed on the home page, yes. I
17 don't know (unintelligible) but it, it's not listed but
18 (unintelligible) I see Flex Protex and Learn More.

19 Q Mr. Callahan, is it fair to say that the letters
20 ITV appear as the logo on each and every informercial
21 produced by Mr. Barrett and Mr. Maihos?

22 A No. Oh, produced? I can't think of one that did
23 not contain it that we did not produce. Ones that we have
24 partnered with other people may not have contained it, but
25 produced, when people have asked us to place media, you know

1 (unintelligible)

2 THE COURT: Tom, you've got a whole bunch to do.

3 THE CLERK: I'll take care of it.

4 BY MR. SILVERMAN:

5 Q Mr. Callahan, I've put before you a printout from
6 the Web site www.itvdirect.com that is a representation of
7 what appears when you click on the products page of the Web
8 site; do you see that?

9 A I see what you've handed to me, yes. Whether it's
10 the product, product page or what, I don't know.

11 Q I'm sorry. I didn't hear.

12 A I don't know where on the Web site or what Web
13 site it appears, but they appear to be products designed to
14 be a product line.

15 MR. SILVERMAN: Your Honor, maybe this is an
16 appropriate time to ask for a running stipulation. I'm
17 happy to take out the electronic media, put the Web site up.
18 You could call it up on the screen, but I'll represent to
19 the Court that this is an accurate representation of what
20 appears on the products page when you click on the link on
21 the home page of www.itvdirect.com.

22 THE COURT: Do you want to stipulate to that or
23 not?

24 MR. BROOKS: I just don't know if it is, your
25 Honor. I certainly believe it to be. I accept

1 Mr. Silverman's representation, but --

2 THE COURT: I'm going to accept it, and then if
3 you want to challenge it later --

4 MR. BROOKS: Go way to do that.

5 THE COURT: Okay.

6 MR. SILVERMAN: Thank you, your Honor.

7 THE COURT: But the burden on you, Mr. Brooks,
8 will be to raise it if you're going to challenge.

9 MR. BROOKS: Understood, your Honor.

10 BY MR. SILVERMAN:

11 Q Now, Mr. Callahan, looking at this products page
12 that's three pages long, there are nine products that are
13 listed; correct?

14 A One, two, three, four, five, six, seven, eight,
15 nine, yes.

16 Q And, Mr. Callahan, you're aware of the fact that
17 there's an informercial associated with each one of these
18 products; correct?

19 A No. Total Living, I've never seen an
20 informercial; Dr. Duarte Disease Prevention Series, I've
21 never seen an informercial. I have never seen the coral
22 calcium tea bags informercial, and then coral calcium on, on
23 the last one of them -- all I (unintelligible) I've seen
24 Rice and Shine, Flex Protex, C-Veg (unintelligible). I
25 haven't seen Natural Cures.

1 Q And you've seen each of those five informercials;
2 right?

3 A Yeah.

4 Q And throughout each of those informercials, the
5 words ITV and ITV Direct are used to represent the host of
6 the informercial; correct?

7 A On the marketing, I can't indicate, you know, the
8 purpose of -- if the mark is there. If it was purposely to
9 identify the host like Donald Barrett, the host, or --

10 Q Excuse me.

11 A -- do you mean the agency of record?

12 Q The producer of the informercial.

13 A Yeah, I, I'm sure it says brought to you by ITV
14 Direct, you know, or, excuse me, brought to you by ITV. You
15 know, I don't know if it says ITV or ITV Direct. I don't
16 know.

17 Q But if we go to the link, Watch the Interview,
18 we'll be able to see the actual video; correct?

19 A No. You'll see on the Internet a video. I have
20 seen the video on the Internet. I have, when I say I saw
21 the videos, it's only the ones that have been airing on
22 television. Those are the ones that I was speaking about
23 when you say informercial.

24 (Pause.)

25 MR. BROOKS: Your Honor, during this break, may I

1 inquire as to the schedule for today? I did have a 2:00
2 engagement.

3 THE COURT: And I actually have a 1:00 lunch
4 meeting, so tell me what your schedule is. I'm sorry it
5 didn't -- it was not brought to my attention that this would
6 be as long as it is.

7 MR. SILVERMAN: Well, your Honor, I think I can --

8 THE COURT: Well, are you going to have
9 cross-examination?

10 MR. BROOKS: Yes, I am, your Honor.

11 THE COURT: I think we need to pick a day. Okay?
12 I don't want to cut you off in the middle of a thought, if
13 you want to ask a few more questions, but I think we do need
14 to -- this witness will have to come back, and we'll work
15 out the subpoenas if -- I assume you want to reserve them or
16 you'll have to agree whether or not you're going to accept
17 service.

18 MR. SILVERMAN: I'm happy to stop here, your
19 Honor.

20 THE COURT: All right. So, what do you think, a
21 day, do you need a day?

22 MR. SILVERMAN: I think I can finish what I have,
23 and apologize that I miscalculated before, I think I can
24 finish the rest of what I have in an hour or less.

25 THE COURT: In?

1 MR. SILVERMAN: An hour or less.

2 THE COURT: All right. And you want these other
3 two witnesses as part of this proceeding?

4 MR. SILVERMAN: I would like the other two
5 witnesses, your Honor. I need to follow up on some of the
6 information that Mr. Callahan just isn't aware of.

7 THE COURT: Okay. What about the trial that
8 settled, Tom? November?

9 THE CLERK: (Unintelligible)

10 THE COURT: Not really.

11 (Pause.)

12 THE COURT: How about on Tuesday, November 7th?

13 MR. BROOKS: Your Honor, I'm scheduled to start a
14 trial in the Middlesex Superior Court on November 3rd. It's
15 projected to go six weeks.

16 MR. SILVERMAN: Your Honor, if I may, up until
17 later yesterday afternoon, we had a hearing scheduled before
18 Judge Tauro in a related action on the 26th.

19 THE COURT: All right. Let's see.

20 MR. SILVERMAN: Actually, I may have that time
21 available.

22 MR. BROOKS: October 26th?

23 MR. SILVERMAN: October 26th.

24 (Pause.)

25 THE COURT: I can do the morning. Do you want to

1 start at 9:30?

2 MR. SILVERMAN: Fine with us, your Honor.

3 MR. BROOKS: That's fine, your Honor.

4 THE COURT: All right. We'll block the morning of
5 October 26th.

6 (Pause.)

7 MR. SILVERMAN: I need --

8 THE CLERK: Are we done with the (unintelligible)

9 MR. SILVERMAN: We're all done with those. I
10 don't think I asked that Exhibits 10 and 11 be admitted into
11 evidence, and I would do so at this time.

12 THE COURT: Okay. They are marked as Exhibits 10
13 and 11.

14 (The document referred to was
15 marked for identification as
16 Exhibit No. 11.)

17 MR. SILVERMAN: Excuse me, admitted into evidence.

18 THE COURT: Yes.

19 (The documents previously marked
20 for identification as Exhibits
21 Nos. 10 and 11 were received into
22 evidence.)

23 THE COURT: If you don't have an agreement as to
24 the other witnesses, let us know. I want to address that
25 before the 26th, if we need to.

1 MR. SILVERMAN: Okay.

2 THE COURT: Okay? All right. Thank you.

3 THE CLERK: Court is in recess.

4 (Whereupon, October 17, 2006, the above matter was
5 adjourned.)

CERTIFICATE OF TRANSCRIBER

This is to certify that the attached proceedings
before: U.S. DISTRICT COURT, DISTRICT OF MASSACHUSETTS
in the Matter of:

CAPPSEALS, INC.,)	
Intervenor Plaintiff,)	
-V-)	CIVIL DOCKET NO.
)	04-10421-JLT
ITV DIRECT, INC.,)	
Consolidated Defendant.)	

Place: Boston, Massachusetts

Date: October 17, 2006

Were held as herein appears, and that this is the true,
accurate and complete transcript prepared from the
recordings taken of the above entitled proceeding.

J. Mocanu
Transcriber

11/14/06
Date